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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

70-208

No. ~~1751~~

**ROSE LOWE MILLER,**

*Petitioner,*

vs.

**MAGGIE P. SPEIGHT,**

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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# INDEX


| | PAGE |
|---|---|
| Judgment and Opinion of the Courts Below | 2 |
| Jurisdictional Statement | 2 |
| Questions Presented for Review | 3 |
| Statutes Involved | 3 |
| Statement of the Case | 5 |
| Reasons for Granting the Writ | 7 |
| Conclusion | 13 |
| Appendices: | |
| A—Opinion of the U. S. District Court | 1a |
| B—Opinion of the U. S. Court of Appeals | 4a |

## List Of Authorities Cited

*Cases*:

Erie Railroad v. Thompkins, 304 U.S. 64 ..... 12

Manos v. Trans World Airlines, Inc., (N.D. Ill. 1969) 295 F. Supp. 1170 ..... 7

Sarro v. Maupin, 127 Ill. App. 2d 26, 261 N.E. 2d 256 ..... 7

Seymour v. Southern Railroad Company, (1906) 117 Tenn. 98, 98 S.W. 174 ..... 10

Sigler v. Youngblood Truck Lines, (E.D. Tenn. 1957) 149 F. Supp. 61 ..... 8

Oliver v. Altsheler, (1955) 198 Tenn. 155, 278 S.W. 675 ..... 10, 11

*Statutes*:

Title 18 U.S.C. Section 1254 ..... 2

Title 28 U.S.C. Section 1652 ..... 3

Chapter 83 Ill. Revised Statutes Section 21 ..... 3, 7

Tennessee Code Annotated 28-304 ..... 4, 7

Tennessee Code Annotated 28-105 ..... 4, 10

Tennessee Code Annotated 28-106 ..... 4, 10

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Rose Lowe Miller, by Louis Gershon and Horace W. Jordan, of Van Duzer, Gershon, Jordan & Petersen, her attorneys, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered on February 9, 1971. A timely Petition for rehearing was filed and was denied on February 26, 1971.

## OPINIONS BELOW.

On December 24, 1969, the District Court for the Northern District of Illinois, Eastern Division, Bernard M. Decker, sitting, filed a memorandum opinion granting the Motion of Rose Lowe Miller to dismiss the Complaint of Maggie P. Speight against her on the ground that the action for personal injuries was barred by operation of the statute of limitations. The opinion of the District Court appears in Appendix A, Pages 1a-3a.

The United States Court of Appeals for the Seventh Circuit reversed the order of Judge Decker in an opinion written by Judge Stevens. This opinion is reported in 437 F. 2d 781, and appears in Appendix B, Pages 4a-8a.

## JURISDICTION.

The opinion and judgment of the United States Court of Appeals was entered on February 9, 1971, and a timely Petition for rehearing was filed and denied on February 26, 1971. This Petition is filed pursuant to Section 1254 of Title 28, Judiciary and Judicial procedure (28 U.S.C.A. 1254).

## QUESTIONS PRESENTED FOR REVIEW.

1. Was the Petitioner unconstitutionally denied due process of law and equal protection by being deprived of the repose from stale claims granted by the law of Illinois and the law of Tennessee?

2. Did the United States Court of Appeals fail to give full faith and credit and follow the state law of Illinois and Tennessee simply because it disagreed with the result or the reasoning of the state law?

## STATUTES INVOLVED.

This case involves the rules of Decision statute U.S.C. Section 1652:

§ 1652. *State laws as rules of decision*

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The Illinois Borrowing Statute, Chapter 83, Ill. Rev. Stats. Section 21:

When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and, by the laws thereof, an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state.

The Tennessee Statute of Limitations, Section 28-304 Tennessee Code Annotated:

> Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, and statutory penalties, shall be commenced within one (1) year after the cause of action accrued.

The Tennessee Savings Statutes, Section 28-105, 28-106 Tennessee Code Annotated:

> 28-105 *Summons as Commencement of Action.*—The suing out of a summons is the commencement of an action, within the meaning of this title, whether it be executed or not, if the action is duly prosecuted and continued by the issuance of alias process from term to term, or recommenced within one (1) year after the failure to execute.
>
> 28-106 *New Action after Adverse Decision Not Foreclosing Merits.*—If the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time, commence a new action within one (1) year after the reversal or arrest.

## STATEMENT OF THE CASE.

On March 17, 1969, the Respondent, Maggie P. Speight, filed a Complaint in the United States District Court for the Northern District of Illinois, seeking damages from the Petitioner, Rose Lowe Miller, for personal injury and property damage alleged to have resulted from an automobile accident which occurred in Nashville, Tennessee, on November 4, 1967. At the time of the accident and the filing of this suit Maggie P. Speight was a resident of Tennessee. At the time of the accident Rose Lowe Miller was driving a car with Virginia license plates and was living in Tennessee. Some time thereafter she moved to Chicago, Illinois, and was served there and jurisdiction was based on diversity of citizenship.

Rose Lowe Miller filed a Motion to Dismiss this Complaint on the ground that it was governed by the one year Tennessee statute of limitations so far as it pertained to personal injury, and that the claim for property damage lacked jurisdictional amount, and further that an action for property damage was presently pending in the Circuit Court of Davidson County, Tennessee.

No reply was filed to this Motion and nothing was alleged to establish any avoidance of the limitation bar. After considering written Briefs Judge Decker filed his memorandum opinion holding that the cause of action for personal injuries was barred by limitation, and that the cause of action for property damage did not satisfy the jurisdictional amount. He entered an order dimissing the Complaint.

Maggie P. Speight filed an appeal from that order, and after the Briefs had been filed, moved the Court of Appeals to amend her Complaint. She alleged that an earlier action had been filed in Tennessee on October 16, 1968. The original Summons was returned "Not Found" on October 29, 1968. All of which was within one year of the accident. An Alias Summons issued November 8, 1968, more than a year after the accident was then served on the Secretary of State as agent for Mrs. Miller. The Supreme Court of Tennessee abated this action so far as it pertained to personal injury on the ground that the agency of the Secretary of State to accept service was limited to one year. The Tennessee case remained pending as to the property damage claim.

The Court of Appeals thereupon rendered its opinion and judgment reversing the Dismissal Order of Judge Decker. This Decision is the basis for this Petition for Writ of Certiorari.

## REASONS FOR GRANTING THE WRIT.

### I.

### THE DECISION OF THE COURT OF APPEALS DENYING ROSE LOWE MILLER HER REPOSE FROM A STALE CLAIM CONSTITUTES A VIOLATION OF HER CONSTITUTIONAL RIGHTS OF DUE PROCESS AND EQUAL PROTECTION.

The Illinois "Borrowing Statute" Chapter 83, Ill. Rev. Stats. Section 21, provides for application of the limitation period of the state where the cause of action arose. In applying this Statute the Illinois courts have looked only to the limitation period provided in the state where the cause of action arose. Thus, in *Sarro* v. *Maupin,* 127 Ill. App. 2d 26, 261 N.E. 2d 756, the Illinois court simply borrowed the one year limitation period provided in Ontario, Canada, where the accident occurred. The provision of this Statute has been held binding on Federal Courts located in Illinois where jurisdiction is based on diversity of citizenship, *Manos* v. *Transworld Airlines, Inc.,* 295 F. Supp. 1170 (N.D. Ill. 1969).

Section 28-304 of the Tennessee Code Annotated specifically provides that actions for injuries to the person shall be commenced within one year after the cause of action accrues. The cause of action here accrued when the accident occurred on November 4, 1967. The Complaint in the United States District Court was filed on March 17, 1967, which is long after the one year had elapsed.

Judge Decker therefore held that the cause of action for personal injuries was barred because it was not filed

within one year after the accident, and dismissed the Complaint. Following the established Illinois practice set forth in Illinois cases, he refused to become involved in technicalities of Tennessee local procedure or laws on a service of process and said:

> Plaintiff here maintains that the filing of suit in this court, within one year of the suing out of the summons in Tennessee, is a "recommencement" within 28 T.C.A. § 105 and is therefore not barred by the one year limitation. This construction of the term "recommenced" in section 105 is subject to serious challenge, however, for it is illogical to conceive of an action filed in a federal district court in Illinois as a "recommencement" of a Tennessee state court action. Further, the original complaint in Tennessee is still pending for property damage, and thus is not yet susceptible of being "recommenced."
>
> Beyond this, however, plaintiff's argument misconstrues the purpose of the "Borrowing Statute." That statute requires this court to examine the law of the foreign jurisdiction to determine if, at the time suit was filed here, suit could have been timely filed there. The technicalities of that jurisdiction's law regarding service of process are irrelevant, for the Illinois statute limits inquiry to that necessary to determine only if suit in the foreign jurisdiction would be barred "by reason of the lapse of time." Because a complaint for personal injuries filed in a Tennessee court on March 17, 1969 would have been barred by that state's statute of limitations, the same result must obtain here.

In the case of *Sigler* v. *Youngblood Truck Lines,* 149 F. Supp. 61 (E.D. Tenn. 1957) it was also held that Section 28-106 of Tennessee Code Annotated had reference to actions commenced in Tennessee and not in a foreign state.

In reversing, the Court of Appeals saw fit to go into such technicalities even though this was contrary to the decisional law of Illinois. Properly it should only have considered the fact that the limitation period in Tennessee was one year. The result is that the Federal courts have applied a different rule of law than the state courts. Thus, Rose Lowe Miller is denied the repose from a claim which is outlawed in Tennessee and which would have been outlawed had the action been filed in the state court. This is so fundamentally unfair as to constitute a violation of her constitutional rights of due process and equal protection. With the great mobility of people in the United States the situation presented here arises frequently and is of great public interest.

## II.

**THE COURT OF APPEALS HAS FAILED TO GIVE FULL FAITH AND CREDIT TO THE ESTABLISHED LAW OF ILLINOIS AND TENNESSEE.**

In becoming involved in the technicalities of Tennessee law on service of process and saving provisions rather than looking only to the one year limitation period, the Court of Appeals has disregarded the provisions of the Illinois statute and the cases interpreting it.

Having done so, it proceeds to compound the error by disregarding the Tennessee decisions interpreting the Tennessee statutes.

The argument of the Respondent, Maggie P. Speight, was based on the allegations in an Amended Complaint which the Court of Appeals allowed to be filed after the Briefs had been filed. Based on those allegations she claimed that her action was preserved by virtue of the

filing of the earlier action in the Tennessee courts on October 16, 1968, which was within the one year period. That action, however, was abated by the Tennessee Supreme Court so far as it pertained to personal injury, and remained pending for property damage. She argued that the suit in the Federal Court in Illinois was saved by the provision of 28-105 and 28-106 of the Tennessee Code Annotated. Section 28-105 provided for recommencement of an action within one year if Summons was not served in the original action, and 28-106 allowed a new suit to be filed within a year if the original suit was disposed of on a ground other than the merits. The Court of Appeals accepted this argument despite the fact that the existing Tennessee cases are to the contrary.

Thus, in *Seymour* v. *Southern Railroad Company,* 117 Tenn. 98, 98 S.W. 174, the Tennessee Supreme Court held that there was not a recommencement under Section 28-105 nor a new action under 28-106 when the original action was still pending for determination. Here, of course, the original action remains pending in Tennessee, and the new suit in the Illinois Federal Court is neither a recommencement nor a new action.

Furthermore, the very argument made by Maggie P. Speight in the Court of Appeals was considered by the Tennessee Supreme Court and rejected in *Oliver* v. *Altsheler* (1955) 198 Tenn. 155, 278 S.W. 2d 675. There a suit was originally filed in Davidson County and Summons was served on the Secretary of State within one year from the accident. The Supreme Court of Tennessee affirmed the allowance of a plea in abatement on the ground that the suit was filed in the wrong county. A second suit was then filed in the proper county, within

one year of the dismissal of the first suit but more than a year after the accident. A plea in abatement was filed on the ground that the second suit was barred because it had not been filed within one year after the accident. The plaintiff there, like Maggie P. Speight here, relied on the saving provision of Section 28-106. The Trial Court rejected this argument and the Supreme Court affirmed saying at Page 676:

> "We hold that the second suit having been filed more than one year from the date of the occurrence is barred by the one year statute of limitations".

This decision was clearly determinative in the case at bar. The Court of Appeals, however, refused to follow the decision of the Tennessee Supreme Court and said that the Tennessee Supreme Court in using the words "statute of limitation" meant the statute limiting the duration of the Secretary of State's agency to accept service on behalf of the out of state resident, rather than the basic statute limiting the time in which the action may be maintained. This was a clear and deliberate disregard of the decision of the Tennessee Supreme Court. Indeed, in its opinion in *Oliver* v. *Altsheler,* the Tennessee Supreme Court specifically noted the distinction between a limitation statute and the duration of the Secretary of State's appointment, and then went on to decide the case on the ground that it was barred by the one year statute of limitations. It is therefore clear that the Tennessee Supreme Court was not confused and was not using the phrase statute of limitations in any other sense than its usual and customary sense as meaning the time in which an action may be maintained.

While it may not like the result reached by following Illinois and Tennessee law, the Court of Appeals has no

right to disregard such law, nor is it justified in ignoring state court decisions interpreting state statutes simply because it considers the reasoning to be unsound. Such action constitutes an unwarranted failure to comply with the duty of the Federal courts to accept and follow applicable state law. This duty is clearly set forth in the rules of decision statute, 28 U.S.C. 1652, and in *Erie Railroad Co.* v. *Thompkins,* 304 U.S. 64. By ignoring this duty the Court of Appeals has placed itself in the position of reversing the Tennessee Supreme Court, which, of course, it is not authorized to do.

Under the Tennessee statutes as interpreted by the Tennessee courts, the suit of Maggie P. Speight would be barred by the one year limitation period in Tennessee, if it had been filed there. Consequently, under the Illinois borrowing statute it should be barred in Illinois whether the suit is filed in the Illinois state court system or in the Federal court system. There is no just reason for requiring the Petitioner, Rose Lowe Miller, to defend in Federal Court against a claim which is outlawed in Tennessee, and which Tennessee would not entertain, and which the Illinois state courts would not entertain.

## CONCLUSION.

We respectfully submit that this case deserves the attention of this Court to make sure that the lower courts accept and follow state law where applicable, and to avoid a dual state of law between state and federal courts in cases involving this kind of question which arises frequently in automobile accident litigation.

Respectfully submitted,

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# APPENDIX A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MAGGIE P. SPEIGHT,
Plaintiff,
vs.
ROSE LOWE MILLER,
Defendant.
No. 69 C 568

## MEMORANDUM OPINION

This is a diversity action to recover damages for personal injuries and property damage allegedly sustained in an automobile collision in Tennessee. Defendant has moved to dismiss on the ground that plaintiff's claim as to personal injuries is barred by the Tennessee statute of limitations, and that her claim as to property damage does not satisfy the jurisdictional amount requirement.

The injuries complained of allegedly occurred on November 17, 1967. Suit was commenced on March 17, 1969. Defendant argues, therefore, that the one year limitation on personal injury actions provided by Tennessee law[1] imposes a bar to further proceedings in this court. Defendant reaches this result by invoking the Illinois "Borrowing Statute," 83 Ill. Rev. Stat. § 21, which provides:

[1] 28 Tennessee Code Annotated Sec. 304:
"Actions for . . . injuries to the person . . . shall be commenced within one (1) year after cause of action accrued."

*(U. S. District Court Opinion)*

> "When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and by the laws thereof, an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state."

Plaintiff does not challenge the applicability of this provision, nor could she, for it is binding on the court when its jurisdiction is based on diversity of citizenship. See, *e.g., Manos* v. *Trans World Airlines, Inc.,* 295 F.Supp. 1170 (N.D. Ill. 1969). She contends, however, that her action is not barred by Tennessee law because of the applicability of another Tennessee statutory provision, 28 T.C.A. § 105, which provides:

> "The suing out of a summons is the commencement of an action, within the meaning of this title, whether it be executed or not, if the action is duly prosecuted and continued by the issuance of Alias process from term to term; or recommenced within one (1) year after the failure to execute."

Plaintiff originally brought suit for damages in the state court in Tennessee on October 16, 1968. Defendant having left the jurisdiction, an alias summons was issued on November 8, 1968. The Tennessee Supreme Court held, however, that the issuance of this summons was untimely under Tennessee law as to the personal injury claim, and therefore held that the Tennessee courts were without personal jurisdiction to determine the issue.

Plaintiff here maintains that the filing of suit in this court, within one year of the suing out of the summons in Tennessee, is a "recommencement" within 28 T.C.A. § 105 and is therefore not barred by the one year limitation. This construction of the term "recommenced" in section 105 is subject to serious challenge, however, for it is illogical to conceive of an action filed in a federal

district court in Illinois as a "recommencement" of a Tennessee state court action. Further, the original complaint in Tennessee is still pending for property damage, and thus is not yet susceptible of being "recommenced."

Beyond this, however, plaintiff's argument misconstrues the purpose of the "Borrowing Statute." That statute requires this court to examine the law of the foreign jurisdiction to determine if, at the time suit was filed here, suit could have been timely filed there. The technicalities of that jurisdiction's law regarding service of process are irrelevant, for the Illinois statute limits inquiry to that necessary to determine only if suit in the foreign jurisdiction would be barred "by reason of the lapse of time." Because a complaint for personal injuries filed in a Tennessee court on March 17, 1969 would have been barred by that state's statute of limitations, the same result must obtain here.

Although the property damage cause survives, defendant states, and plaintiff does not dispute, that it does not meet the jurisdictional amount requirement of 28 U.S.C. § 1332. The prayer for recovery for property damage is limited to expenses incurred in repairing plaintiff's automobile.

Because the cause of action for personal injuries is barred by the statute of limitations, and the cause of action for property damage does not satisfy the jurisdictional amount, an order has been entered today granting defendant's motion and dismissing the complaint.

Enter: /s/ Bernard M. Decker
United States District Judge

Dated: December 24, 1969.

# APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM AND SESSION 1970

No. 18309
MAGGIE P. SPEIGHT,
*Plaintiff-Appellant,*
vs.
ROSE LOWE MILLER,
*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

February 9, 1971

Before CASTLE, *Senior Circuit Judge,* CUMMINGS and STEVENS, *Circuit Judges.*

STEVENS, *Circuit Judge.* Plaintiff asserts a personal injury claim arising out of an accident in Nashville, Tennessee, on November 4, 1967. Her complaint, filed in the District Court on March 17, 1969, was dismissed as barred by Tennessee's one-year statute of limitations.[1] She contends that her claim was preserved by the filing of an earlier action in the Tennessee courts on October 16, 1968, less than a year after the accident. She was not able to pursue her personal injury claim in the Tennessee courts because defendant had moved to Chicago, and plaintiff

[1] Tenn. Code Ann. Sec. 28-304 (Cum. Supp. 1970). The amount claimed as property damage was insufficient to support federal jurisdiction. 28 U.S.C. Sec. 1332.

was unable to effect service of process.[2] We believe plaintiff correctly construes the applicable state statutes.

As federal jurisdiction is supported by the diverse citizenship of the parties, we first consider the law of Illinois. *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487; see *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532. The complaint was filed within the two year period allowed by Illinois for claims of this kind. Ill. Rev. Stat. Ch. 83, § 15 (1969). The question, however, is whether the claim is barred by the Illinois "borrowing statute."[3] It provides:

> "When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and, by the laws thereof, an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state." Ill. Rev. Stat. Ch. 83, § 21 (1969).

Under the plain language of this statute the question to be decided is whether "by reason of the lapse of time" between the accident and March 17, 1969, plaintiff would have been barred from maintaining her action in Tennessee "by the laws thereof." Both of the quoted phrases support plaintiff's interpretation of the statute. Her action was barred in Tennessee not simply "by reason of the lapse of time," but more precisely by her inability to ob-

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[2] Plaintiff made two bona fide attempts to effect service on the defendant. Within the year, a deputy sheriff attempted to serve her personally at the address in Nashville where she resided at the time of the accident. Alias process was thereafter served through the agency of the Tennessee Secretary of State, but was ineffective with respect to the personal injury claim because not issued until November 8, 1968, more than a year after the accident. Her property damgae claim is still pending in Tennessee. Speight v. Miller, 443 S.W.2d 657 (1969). She has represented that she will dismiss that litigation if the action in the District Court is permitted to proceed. That Court properly took judicial notice of the Tennessee litigation. Moreover, that proceeding is now described in an amended complaint which we granted appellant leave to file.

[3] As we understand the holdings of the relevant Illinois cases involving the assertion of common-law claims, there would be no need to consider the borrowing statute if another Illinois limitations statute barred the action; certainly this would be true if one of the parties had been an Illinois resident at the time of the occurrence. See, e.g., Jackson v. Shuttlesworth, 42 Ill. App. 2d 257, 192 N.E.2d 217 (3rd Dist. 1963); Bernard Food Industries, Inc. v. Dietene Co., 415 F.2d 1279, 1282 (7th Cir. 1969), and cases cited therein.

tain personal jurisdiction over the defendant. Reference to "the laws" in the plural persuades us that provisions in the Tennessee Code which toll its statute of limitations, as well as the limitations period, are borrowed by Illinois.[4]

Plaintiff was unable to pursue her personal injury claim in the Tennessee courts because she could not effect service on the defendant.[5] If defendant had been amenable to process in Tennessee on March 17, 1969, under the laws of Tennessee the action could have been maintained in the courts of that state. Section 28-105 of the Tennessee Code provides:

> *"Summons as Commencement of Action.* The suing out of a summons is the commencement of an action; within the meaning of this title, whether it be executed or not, if the action is duly prosecuted and continued by the issuance of alias process from term to term, or recommenced within one (1) year after the failure to execute." Tenn. Code Ann. § 28-105 (1955).

The term "suing out of a summons" refers to the issuance of process, with instructions to effect service, rather than the completion of successful service. *Robertson* v. *Giant Food Market, Inc.*, 210 Tenn. 356, 358 S.W.2d 338 (1962). Summons issued and the Tennessee action was commenced within a year after the accident. March 17, 1969, was, therefore, well within the additional one year period in which the Tennessee action could have been recommenced. It was defendant's absence from Tennessee rather than the mere lapse of time which prevented plaintiff from maintaining her action in the Tennessee courts.

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[4] In American Surety Company of New York v. Gainfort, 219 F.2d 111, 112 (2d Cir. 1955), Judge Clark referred to "the general principle that the borrowed statute of limitations is accepted with all its accouterments. . . ."

[5] At the time plaintiff attempted to serve defendant through the agency of the Tennessee Secretary of State, the peroid in which the Secretary could accept service for property damage claims was three years, while the period of agency for personal injury claims was only one year. Thus, plaintiff's service was effective to sustain the property damage claim. Public Acts of 1968, Ch. 574, Secs. 1-2 amending Tenn. Code Ann. Sec. 20-224; Speight v. Miller, 443 S.W.2d 657 (1969); see note 2 supra. The statute was amended again in 1970. The present amendment expressly limits the agency of the Secretary to the period in which the cause of action is not barred by the relevant statute of limitations. Tenn. Code Ann. Sec. 20-224 (Cum. Supp. 1970).

*Fowler* v. *Herman*, 200 Tenn. 201, 292 S.W.2d 11 (1956).[6] The claim, therefore is not barred by the Illinois borrowing statute.

Defendant argues that an action filed in the federal court in Chicago is not a "recommencement" of Tennessee litigation within the meaning of § 28-105 of the Tennessee Code. Assuming that proposition to be correct, the more relevant inquiry is whether the action could have been "recommenced" in Tennessee on March 17, 1969. Defendant answers in the negative on the authority of the trial court ruling referred to in *Seymour* v. *Southern Ry. Co.*, 117 Tenn. 98, 98 S.W. 174 (1906), since plaintiff's property damage claim is still pending in the state court. Again, however, even if we make the doubtful assumption that the personal injury suit could not have been recommenced by reason of the pendency of the property damage claim,[7] it is not barred by the Illinois borrowing statute unless the recommencement is foreclosed "by reason of the lapse of time."

Finally, defendant relies on *Oliver* v. *Altsheler*, 198 Tenn. 155, 278 S.W.2d 675 (1955) which holds that out of state service cannot be effected more than a year after the accident even if an action is originally commenced within the year. Particular reliance is placed on the following statement:

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[6] The decision in Fowler was based upon Sec. 28-105 of the Tennessee Code. Plaintiff in that case, like appellant here, also relied on Sec. 28-106 which provides:

> "New Action After Adverse Decision Not Foreclosing Merits.—If the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not including his right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time, commence a new action within one (1) year after the reversal or arrest." Tenn. Code Ann. Sec. 28-106 (1955).

[7] The assumption is doubtful, not only because the 1906 trial court decision in Seymour may or may not have represented the law in Tennessee at that time, but also because we assume that today Tennessee would permit the personal injury claim to be pursued in the same litigation as the property damage claim if service were adequate and if the personal injury claim was not barred by reason of the lapse of time. There is no indication to the contrary in the opinion of the Tennessee Supreme Court in Speight v. Miller, 443 S.W.2d 657 (1969).

> "We hold that the second suit having been filed more than one year from the date of the collision is barred by the one year statute of limitation." 278 S.W.2d at 676.

As we read the court's opinion in that case, however, the "statute of limitations" referred to in the quoted excerpt is the statute limiting the duration of the Secretary of State's agency to accept service on behalf of an out of state resident,[8] rather than the basic statute limiting the time in which the action may be maintained.[9] Support for this interpretation is found in the comment of the court earlier on the same page that the suit had not been determined "on its merits and the cause of action survives under the provision of § 8572 of the Code."[10] The fact that Tennessee had not effectively provided for out of state service more than one year after the accident did not prevent the cause of action from surviving in Tennessee; consequently, the claim is not foreclosed by the Illinois borrowing statute.

Tht judgment is reversed.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit.*

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[8] 1932 Code, Sec. 8671, now Tenn. Code Ann. Sec. 20-224 (Cum. Supp. 1970).

[9] 1932 Code, Sec. 8595, now Tenn. Code Ann. Sec. 28-304 (Cum. Supp. 1970).

[10] Sec. 8572 of the 1932 Code was the savings clause which is now Tenn. Code Ann. Sec. 28-106 (1955). See footnote 6.

SUPREME COURT, U. S.
Supreme Court, U.S.
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*vs.*

MAGGIE P. SPEIGHT,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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# INDEX


| | PAGE |
|---|---|
| Statutes Involved | 1 |
| Statement of the Case | 2 |
| Argument | 5 |
| Conclusion | 8 |

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OCTOBER TERM, 1970

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## *No. 1751*

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**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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Respondent, Mrs. Maggie P. Speight, by Alan E. Morrill and William J. Harbison, her attorneys, respectfully submits that the petition for certiorari filed herein is without merit and that the petition should be denied. No substantial federal question is presented nor are any of the other considerations set forth in Rule 19 of the Rules of this Court present. The case involves only the construction and interpretation of certain Tennessee statutes dealing with the period of limitation for filing personal injury suits.

### STATUTES INVOLVED.

The applicable statutes are correctly quoted in the petition for certiorari, pages 3 and 4. It should be noted that

the savings statutes, Tennessee Code Annotated, Sections 28-105 and 28-106 are an integral portion of the Tennessee Code dealing with statutes of limitations in general.

## STATEMENT OF THE CASE

There is no dispute as to the facts of the case, which are correctly stated in the opinion of the Court of Appeals for the Seventh Circuit, 437 F.2d 781. Respondent brought suit in the Tennessee state courts against the defendant on October 16, 1968, claiming damages for personal injuries and property damage arising out of an accident which occurred in Nashville, Tennessee, on November 4, 1967. The suit was, therefore, clearly begun within the one-year statute of limitations provided by the Tennessee code for personal injury actions, T.C.A. 28-304. (The state allows three years for filing property damage claims, T.C.A. 28-305)

In the interim between the date of the accident and the filing of suit, the defendant had left Tennessee and had moved to Chicago, although this information was not known to the plaintiff or her counsel at the time of filing suit in Tennessee. The original summons was, therefore, returned by the Tennessee deputy sheriff unserved, and respondent then sought to obtain service upon the petitioner through the Tennessee Nonresident Motorist Statute, T.C.A. 20-224, by having alias process issued through the Secretary of State of Tennessee. This service was held ineffective, however, because the alias summons was issued more than one year after the date of the accident. See *Speight* v. *Miller*, 443 S.W.2d 657 (Tenn. 1969).

After service of process was held ineffectual in Tennessee, not because of the statute of limitations but because of the lapse of a one-year agency period for the Secretary of State, as then provided by Tennessee statutes, respondent

filed the present suit in the United States District Court for the Northern District of Illinois on March 17, 1969. This was more than one year after date of the original accident, but only a few months after the return of the original process in Tennessee unserved. Two Tennessee statutes provide an additional one-year period for the continued prosecution or refiling of suits which have been originally brought within an applicable period of limitations, where the original summons could not be served or where the original suit was dismissed for any reason not concluding the merits of the case. Tennessee Code Annotated, Sections 28-105, 28-106.

The statute of limitations governing personal injury actions in Illinois is two years, so that the filing of the suit in the U. S. District Court in Illinois did not in any way offend or violate the Illinois statute of limitations. Like many states, Illinois has a borrowing statute which does not permit the filing of suits in Illinois where the suits would be barred in the state of origin. The District Court, pursuant to petitioner's motion to dismiss, held that the present suit filed by respondent in Illinois was barred under the Illinois borrowing statute, but the Court of Appeals for the Seventh Circuit reversed this holding and held the present action timely filed in Illinois. The Court of Appeals carefully and thoroughly considered the Tennessee savings statutes above referred to, and held that the present suit would not have been barred had it been filed in Tennessee on March 17, 1969; it therefore was not barred when filed in the federal court in Illinois.

It should be stated that insofar as the original suit brought in Tennessee sought property damage, the Tennessee courts held this aspect of the suit to be timely filed under the Tennessee statutes, and that portion of the case

is still pending in Tennessee. Counsel for respondent have represented to the courts below and represent to this Court, however, that that aspect of the case will be dismissed and not pursued in Tennessee, since it is also embraced in the Illinois suit. Respondent has no desire or wish to fragment the litigation, and will not force petitioner to litigate in two different courts. Respondent does insist, however, that she is entitled to a trial of her case on the merits and that she has exercised all possible diligence to locate the petitioner and obtain effective service of process upon her, so that she may have a trial both of the personal injury and property damage claims upon their merits.

## ARGUMENT

As stated at the outset, this case involves nothing more than the correct application and interpretation of statutes of the State of Tennessee. The operation of the Illinois borrowing statute depends upon the application of the Tennessee statutes of limitations, because the Illinois borrowing statute forbids the prosecution of the present suit in Illinois only if the suit would have been barred had it been brought in a Tennessee state court. As pointed out previously, there is nothing in the local law of Illinois which is offended in any way by the present suit. The suit was brought within less than two years following the date of the accident, so that local statutes of limitations of Illinois do not bar the action.

There is no question of the interpretation or application of an Act of Congress or of the United States Constitution. The case does not present a situation where there is a conflict among the various courts of appeals nor are there presented any of the other situations mentioned in Rule 19 of the Rules of this Court as affording a predicate for the granting of a writ of certiorari.

The Court of Appeals for the Seventh Circuit concluded correctly that had the present suit been reinstated in Tennessee on March 19, 1970, it would not have been barred by the Tennessee statutes of limitations. Both of the savings statutes would have permitted respondent an additional one year for the filing of her suit. Under Tennessee Code Annotated, Section 28-105 respondent would have been allowed to file suit within one year from the date of the return unserved of her original summons, October 28, 1968.

In other words under T.C.A. 28-105, a suit filed in Tennessee prior to October 28, 1969, would have been timely; the present suit was filed on March 19, 1969.

Likewise under T.C.A. 28-106 respondent would have had one year from the time of the dismissal of her suit upon petitioner's plea in abatement in the state court to refile her action. Dismissal in the state trial court occurred in February, 1969. This dismissal was not upon the merits, but simply upon the expiration of the agency of the Secretary of State under the Tennessee non-resident motorist statutes. Accordingly respondent would have had, at a minimum, one year from the date of the dismissal in the trial court within which to file a new action under T.C.A. 28-106. The present suit was filed within approximately one month of the dismissal in the state trial court, and was filed before the Tennessee Supreme Court had even affirmed the trial court.

Petitioner, through her counsel, has made every effort to avoid a trial of this case upon its merits. Every conceivable technicality has been interposed to try to prevent the assertion of respondent's claim. Respondent has never sought to do anything other than to obtain effective service of process upon the petitioner and to bring her case to trial. The Court of Appeals for the Seventh Circuit carefully construed the applicable Tennessee statutes, and construed them in conformity with the holdings of the Tennessee Supreme Court, discussed in the opinion below, to the effect that the savings statutes are to be liberally construed and are clearly applicable to cases such as the present. There simply can be no question but that had respondent refiled her suit in Tennessee, the suit would not have been barred. Under these circumstances it certainly is not barred under the Illinois "borrowing" statute. It was not refiled in Ten-

nessee, of course, for the simple reason that effective service of process could not be had there, but it was filed in a state where effective service could be had, and within the time limitations provided by the forum state.

With respect to the amendment of the complaint of respondent in the Court of Appeals, it should be stated that such amendment was permitted by the Court of Appeals without objection on the part of petitioner. The amendment simply set out the relevant facts concerning the previous Tennessee litigation, which had already been judicially noticed by the lower court and referred to by both parties in their briefs and by the lower court in its opinion. Certainly the Court of Appeals for the Seventh Circuit cannot be put in error by permitting an amendment to which petitioner did not object and which simply reflected matters of which the courts could properly take judicial notice in all events.

## CONCLUSION

We submit that the petition for certiorari filed in this case is entirely without merit and presents no matters for appropriate consideration by this Court. The Court of Appeals for the Seventh Circuit has reached the correct result, has properly construed Tennessee statutes applicable to the case, and in no way has violated or offended any constitutional rights of the petitioner or failed in any way properly to observe either state or federal law applicable to the case. Rather, it is the petitioner who has sought and still seeks to deny respondent a trial of respondent's case on the merits in the state where the petitioner lives and where she is before the court by personal service of process.

The petition for certiorari should be denied.

Respectfully submitted,

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